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Signature Page*

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF WASHINGTON

COMMUNITY ASSOCIATION FOR
RESTORATION OF THE
ENVIRONMENT, INC., a Washington
Non-Profit Corporation

And

CENTER FOR FOOD SAFETY, INC.,
a Washington, D.C. Non-Profit
Corporation,

Plaintiffs,

v.

D & A Dairy, a Washington Partnership

and

D & A Dairy, LLC, a Washington
Limited Liability Company,
Defendants.

CASE NO. CV-13-3018-TOR

DEFENDANTS' MOTION TO
STRIKE DECLARATIONS
(Dkts. 36, 37, 38, 39, 40, 41)

NOTED: June 21, 2013
6:30 p.m.

Without oral argument

DEFENDANTS' MOTION TO STRIKE DECLARATIONS
(Dkts. 36, 37, 38, 39, 40, 41)

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I. INTRODUCTION

On April 29, 2013, Defendants in four pending cases (collectively, “Dairies”) filed *Defendants’ Joint Motion to Dismiss* (Dkt. 26).¹ On May 14, Plaintiffs Community Association for Restoration of the Environment and Center for Food Safety (collectively, “CARE”) filed a *Response to Defendants’ Joint Motion to Dismiss* (Dkt. 35) (“*Response*”). In support of the *Response*, CARE filed the *Declaration of Byron Shaw* (Dkt. 36) (“*Shaw Declaration*”). Mr. Shaw purports to be an expert on the environmental impacts of Confined Animal Feeding Operations (“CAFOs”). The *Shaw Declaration* contains three attachments: his CV (Dkt. 36-1), excerpts from a 2012 EPA report regarding nitrates in well water in the Lower Yakima Valley, (Dkt. 36-2) and what CARE contends is a 2009 inspection report for “Cow Palace” (Dkt. 36-3).² Defendants’

¹ The cases are: (1) *Cnty. Ass’n for Restoration of the Env’t, et al. v. Cow Palace, LLC*, CV-13-3016-TOR (filed Feb. 14, 2013); (2) *Cnty. Ass’n for Restoration of the Env’t, et al. v. George & Margaret, LLC et al.*, CV-13-3017-TOR (filed Feb. 14, 2013); (3) *Cnty. Ass’n for Restoration of the Env’t, et al. v. D & A Dairy, et al.*, CV-13-3018-TOR (filed Feb. 14, 2013); and (4) *Cnty. Ass’n for Restoration of the Env’t, et al. v. Henry Bosma Dairy, et al.*, CV-13-3019-TOR (filed Feb. 14, 2013).

² Filing portions of the EPA report is highly inappropriate at this stage. The

1 *Joint Motion to Dismiss* tests the adequacy of CARE's pleadings. It assumes all
2 allegations in the *Complaints* are true. Expert declarations are inappropriate at
3 this stage of the litigation. Therefore, the *Shaw Declaration* and its attachments
4 should be stricken. *Blau v. Harrison*, 2006 WL 850959, at *1 (N.D. Ill. 2006)
5 (granting defendant's motion to strike expert declaration attached to plaintiff's
6 opposition to motion to dismiss).
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9 CARE also filed five non-expert declarations: the *Declaration of Andrew*
10 *Kimbrell* (Dkt. 37) ("*Kimbrell Declaration*"), the *Declaration of Jan Whitefoot*
11 (Dkt. 38) ("*Whitefoot Declaration*"), the *Declaration of Angela Galbreath* (Dkt.
12 39) ("*Galbreath Declaration*"), the *Declaration of Helen Reddout in Support of*
13 *Plaintiffs' Opposition to Joint Motions to Dismiss* (Dkt. 40) ("*Reddout*
14 *Declaration*") and the *Declaration of Larry Fendell in Support of Plaintiffs'*
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17 Dairies dispute the conclusions in the EPA's report, which has been criticized by
18 the EPA's own independent third party reviewers, state and local agencies and
19 other interested parties. Filing an unauthenticated inspection report and
20 expounding upon it in an expert declaration is also inappropriate. In any event,
21 the inspection report notes that "no manure water appears to have left the field"
22 and "[s]ome small areas of ponding were disked in right after application." Dkt.
23 36-3. The Dairies should not be forced to argue factual matters such as these in
24 the context of a Rule 12(b)(6) Motion.
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1 *Opposition to Joint Motion to Dismiss* (Dkt. 41) (“*Fendell Declaration*”)
2 (collectively, “*Standing Declarations*”). The *Standing Declarations* purport to
3 establish CARE’s standing. Yet at this stage in the litigation, standing must be
4 determined by reference to the allegations in the *Complaints*. Moreover, the
5 *Standing Declarations* contain factual and legal assertions far beyond standing
6 requirements. Therefore, the *Standing Declarations* should be stricken in their
7 entirety. If the Court is not inclined to strike them entirely, the Dairies
8 respectfully request the Court strike the unnecessary and inappropriate factual
9 and legal assertions contained therein.
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13 II. ARGUMENT

14 It is a fundamental tenet of federal civil procedure that a motion to dismiss
15 tests “the adequacy of the pleadings, not the adequacy of the evidence.” *Solid 21,*
16 *Inc. v. Breitling USA, Inc.*, 2013 WL 1116539, *1 (9th Cir. 2013) (unpublished).
17 “When there are well-pleaded factual allegations, a court should assume their
18 veracity and then determine whether they plausibly give rise to an entitlement to
19 relief.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Factual matters “have no
20 bearing on the legal sufficiency of the allegations under Rule 12(b)(6).” *Lee v. City*
21 *of Los Angeles*, 250 F.3d 668, 688 (2001). Accordingly, courts routinely strike
22 declarations that contain factual matters outside the complaint, when offered in
23 opposition to a motion to dismiss. *E.g., Roshandel v. Chertoff*, 2008 WL 1969656,
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*3 (W.D. Wash. 2008) (striking declarations filed in response to motion to dismiss); *Pistoresi v. Madera Irr. Dist.*, 2008 WL 5070051, *7 (D. Or. 2008) (same). The Dairies respectfully request the Court do the same in this case.

A. The *Shaw Declaration* Should be Stricken Because it Attempts to Present Factual Matters Outside the *Complaint*.

CARE contends the *Shaw Declaration* provides “further support for the Complaints’ factual allegations.” *Response* at 5 n.2. But factual support is unnecessary, as the allegations must be taken as true. *Iqbal*, 556 U.S. at 679. If this is the true reason for the *Shaw Declaration*, it should be stricken as entirely unnecessary.

Despite CARE’s contention that the *Shaw Declaration* merely provides “support for” the *Complaints’* allegations, the *Shaw Declaration* contains many factual assertions that are not alleged. For example, Mr. Shaw states that the water level has raised 40 feet since irrigation began, *Shaw Declaration* at ¶11, and expounds upon manure lagoons in Iowa, *id.* at ¶16. He also attempts to explain “Darcy’s law” as applied to manure lagoons—an issue not mentioned in the *Complaints*. *Id.* at ¶12. The Dairies’ *Joint Motion to Dismiss* tests “the adequacy of the pleadings, not the adequacy of the evidence.” *Solid 21*, 2013 WL 1116539, *1. Considering factual matters outside the *Complaints* is inappropriate on a Rule 12(b)(6) motion. Thus, the *Shaw Declaration* should be stricken. *See Blau*, 2006 WL 850959 at *1 (“As [the expert] affidavit is neither referenced in

1 the Complaint nor attached to the pleadings, the Court may not consider his
2 affidavit in ruling on the Defendants' Rule 12(b)(6) motion. Accordingly, the
3 Court grants Defendants' motion to strike and excludes the extraneous
4 material.”).

6 CARE also implicitly contends the *Shaw Declaration* is necessary to
7 identify matters that need discovery in order to be resolved. *Response* at 7 n. 5.
8 To that end, Mr. Shaw contends he needs discovery to draw definitive
9 conclusions regarding “facility waste volumes and the fate of the waste.” *Shaw*
10 *Declaration* at ¶9. Of course discovery is needed for Mr. Shaw to opine on such
11 matters. This fact is irrelevant to the issues before the Court on the *Motions to*
12 *Dismiss*. The *Joint Motion to Dismiss* does not test factual matters; it tests the
13 adequacy of the *Complaints*. The *Complaints* contain allegations regarding the
14 volume of manure lagoons and the manure's ultimate fate. Mr. Shaw's assertion
15 is therefore irrelevant. The need for discovery on the merits does not justify the
16 *Shaw Declaration* or defeat a motion to dismiss.

21 **B. The *Standing Declarations* Should be Stricken Because They Are Not**
22 **Necessary to Establish Standing and Because They Contain Legal**
23 **Arguments and Factual Assertions Outside the *Complaints*.**

24 The three constitutional standing requirements—injury-in-fact, causation
25 and redressability—“must be supported in the same way as any other matter on
26 which the plaintiff bears the burden of proof.” *Lujan v. Defenders of Wildlife*,
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1 504 U.S. 555, 561 (1992). “At the pleading stage, general factual allegations of
2 injury resulting from the defendant’s conduct may suffice, for on a motion to
3 dismiss we presume that general allegations embrace those specific facts that are
4 necessary to support the claim.” *Id.* In this case, the *Complaints* contain factual
5 allegations regarding CARE’s standing. The Dairies do not challenge the
6 adequacy of these allegations as to CARE’s standing at this point in the litigation.
7
8 The *Standing Declarations* are therefore unnecessary and inappropriate. They
9 should be stricken.
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12 Even if declarations were required to prove standing—and they are not—the
13 *Standing Declarations* attempt to present legal arguments or factual matters to the
14 Court. These arguments and assertions are entirely unnecessary for standing
15 purposes. For example, in the *Kimbrell Declaration*, Mr. Kimbrell states that “[t]he
16 Defendants’ industrial production of dairy products also involves the generation,
17 handling, storage, treatment, transport or disposal of animal waste.” *Kimbrell*
18 *Declaration* at ¶11. This parrots the language of RCRA’s citizen-suit provision
19 regarding imminent and substantial endangerment. 42 U.S.C. § 6972(1)(B)
20 (authorizing citizen suit against any person who “generat[es]” or “has contributed
21 or who is contributing to the . . . handling, storage, treatment, transportation, or
22 disposal of any solid or hazardous waste which may present an imminent and
23 substantial endangerment to the health or the environment”). Mr. Fendell asserts
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1 that he has observed what he perceives to be over-application of manure. *Fendell*
2 *Declaration* at ¶19. Over-application is alleged in the *Complaints*; factual
3 assertions are inappropriate. Arguments and assertions such as these occur
4 throughout the *Standing Declarations*. They do not establish injury, causation or
5 redressability; they attempt to support the arguments CARE makes in its *Response*.
6 Because the *Standing Declarations* constitute an attempt to introduce inappropriate
7 arguments and facts to the Court on a motion to dismiss, they should be stricken.
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10 If the Court is not inclined to strike the *Standing Declarations* in their
11 entirety, the Dairies respectfully request the Court strike the legal arguments and
12 factual assertions that go beyond those necessary to establish standing. A list of
13 these paragraphs follows. *Kimbrell Declaration*: ¶¶8 through 16. *Whitefoot*
14 *Declaration*: ¶¶8, 9, 10, 11, 12, 13, 14, 15, 16, 18 and 19. *Galbreath*
15 *Declaration*: ¶¶4, 5, 6, 7, 8, 10, 11, 12 and 13. *Reddout Declaration*: ¶¶9, 10, 12
16 and 14 through 25. *Fendell Declaration*: ¶¶6, 8, 9 and 10 through 20.
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20 III. CONCLUSION

21 The Dairies' *Joint Motion to Dismiss* tests the adequacy of the allegations in
22 the *Complaints*, not CARE's ability to prove them. Through numerous
23 declarations, CARE improperly attempts to inject factual matters into the Court's
24 decision. The Dairies respectfully request that the Court strike these Declarations.
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DATED this 22nd day of May 2013.

/s/ Debora K. Kristensen

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of May 2013, I caused the following parties or counsel to be served by electronic means, as more fully reflected in the Notice of Electronic Filing:

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